87-2057

No. _____

Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.

In The

Supreme Court of the United States

October Term, 1987

—o—

GEOFFREY B. SMITH, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

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QUESTION PRESENTED FOR REVIEW

I. Whether the protections afforded by the Fourth Amendment apply to illegal searches by government employees when those searches are conducted for personal gain.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

The Petitioner, Geoffrey B. Smith, prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit, which became final on April 15, 1988.[1]

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[1]The only parties to this proceeding are those named in the caption in the case.

OPINION BELOW

On February 10, 1987, the United States Court of Appeals for the Tenth Circuit filed its Opinion affirming the Petitioner's conviction. That Opinion is reproduced in this Petition as Appendix "A".

———o———

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit was filed on February 10, 1987. A Petition for Rehearing, timely filed on behalf of the Petitioner, was denied April 15, 1988. The Order denying the Petition for Rehearing appears as Appendix "B" in this Petition. This Petition for Writ of Certiorari is timely filed within sixty (60) days from the date of the denial of the Petition for Rehearing. The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254, and Supreme Court Rule 20, 28 U.S.C.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV, United States Constitution, provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall isssue, but upon probable cause, sup-

ported by Oath, or affirmation, and particularly describing, the place to be searched, and the persons or things to be seized.

Section 841(a), Title 21 U.S.C., provides as follows:

Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally:

(1) to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance; or,

(2) to create, distribute or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Section 843(b), Title 21 U.S.C., provides as follows:

Communication Facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

Section 846, Title 21 U.S.C., provides as follows:

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 11 of the Federal Rules of Criminal Procedure, provides as follows:

(a) Alternatives

(2) Conditional Pleas.

With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

———o———

STATEMENT OF THE CASE

On March 12, 1985, a superseding indictment was filed with the United States District Court for the District of Kansas, charging the Petitioner, Geoffrey B. Smith, Jr. (hereinafter referred to as "Petitioner" or "Smith") with one count of possession with intent to distribute, and distribution of two ounces of cocaine, a schedule II controlled substance, one count of conspiracy to possess with intent to distribute the same two ounces of cocaine, and three counts of using and causing to be used a communication facility to facilitate the conspiracy and distribution counts, all in violation of 21 U.S.C. 841(a), 846, and 843(b), respectively.

On June 24, 1985, Petitioner filed his Motion To Suppress Evidence, seeking to suppress the cocaine and fruits thereof seized by United States Postal employee, Ernest Van Dusen, as a result of his unauthorized search of an

Express Mail Package mailed by the Petitioner on September 21, 1983.

The package containing approximately two ounces of cocaine was mailed by the Petitioner from Fort Lauderdale, Florida, to Gerald Gibson in Wichita, Kansas, via the United States Postal Service. Ernest Van Dusen, a United States Postal Service employee responsible for delivery of Express and Special Delivery Mail, took possession of the package on September 22, 1983, in order to deliver it to Mr. Gibson. Van Dusen suspected the package contained cocaine because it was mailed from the state of Florida. In the course of delivering other packages, Van Dusen went into a restroom, opened the package mailed by Mr. Smith and discovered the cocaine. Van Dusen sampled the cocaine and returned the package to its original condition. This was not the first occasion Van Dusen had searched mails entrusted to him for delivery. After finishing his rounds, he proceeded home with the cocaine. Later that evening, after having become "paranoid", Van Dusen contacted an attorney. On September 25, 1983, Van Dusen and his lawyer delivered the package containing the cocaine to agents of the Federal Bureau of Investigation. FBI agent Robert Jobe opened the package and substituted counterfeit ingredients for the cocaine. On September 27, 1983, an Express Mail package, containing the counterfeit cocaine, was delivered by Van Dusen to Gerald Gibson.

On September 30, 1985, after the above-mentioned facts were developed at an evidentiary hearing pertaining to the Motion to Suppress, the Honorable Patrick F. Kelly, United States District Court Judge, although finding Van Dusen was a government agent per se, denied the Peti-

tioner's Motion to Suppress. A copy of the Court's ruling is contained in Appendix "C".

On January 6, 1986, with the approval of the Court and the consent of the government, the Petitioner tendered conditional pleas of guilty to counts I and II of the indictment, charging him with conspiracy to possess with intent to distribute, and possession with intent to distribute cocaine, a schedule II controlled substance, reserving his right to appeal from the Judgment, pursuant to Fed. R. Crim. P. 11(a)(2) to review the adverse determination made on his Motion to Suppress.

On April 11, 1986, the District Court sentenced the Petitioner to a term of imprisonment of five years on each of the two counts, and ordered the sentence to be served concurrently. The Court further ordered a special term of parole of six years as to count II.

On February 10, 1987, the United States Court of Appeals for the Tenth Circuit affirmed the District Court Suppression Order. In so doing, the Tenth Circuit relied on the common law torts concept of "scope of employment" and determined that because the postal employee was acting for personal gain and engaging in an on-the-job activity not within the ambit of his job responsibility, Fourth Amendment proscriptions did not apply to his search and seizure of Petitioner's package. Petitioner filed his Petition for Rehearing on March 25, 1987. On April 15, 1988, his Petition was denied.

———o———

REASONS FOR GRANTING THE WRIT

In Upholding the search in this case, the Tenth Circuit created a "scope of employment" test to determine whether acts of a government agent acting within the course of his government employment fall within the proscriptions of the Fourth Amendment. The basis for the holding was that because the duties of a postal employee did not encompass searching the packages he was assigned to deliver, the employee was not acting as a government agent for purposes of application of the Fourth Amendment.

This "scope of employment" test is without basis in any legal precedent and serves to limit the proscriptions of the Fourth Amendment to a narrowly defined group of government agents—those agents whose scope of employment necessarily includes conducting searches and seizures. The logical extension of this new test will serve to sanction a myriad of "illegal searches" by government agents whose duties do not expressly include conducting searches or engaging in criminal investigations.

When the Petitioner placed the package with the United States Postal Service, he had the recognized expectation that his package would be free from random inspectation and search by government authorities. *United States v. Leeuwen*, 397 U.S. 249 (1970); *United States v. Jacobsen*, 466 U.S. 109 (1984). When Van Dusen came into possession of this package, he did so in the course of his employment by the United States Postal Service as a special delivery messenger. When he searched the package that had come into his possession as a result of his governmental duties, he was acting as a government agent. In

finding the search to be outside the purview of the Fourth Amendment, the Tenth Circuit reasoned that since the postal employee's search and seizure of the package was not intended "to further a governmental objective", "there was no governmental search or seizure within the intendment of the Fourth Amendment". *United States v. Smith*, 810 F.2d 996, 998 (10th Cir. 1987).

The Tenth Circuit's analysis ignores certain basic principles that underlie the Fourth Amendment. The Fourth Amendment was intended as a restraint upon the acts of a sovereign authority. *Burdeau v. McDowell*, 256 U.S. 465 (1921). The fundamental protection as guaranteed to the people by this amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. *Camara v. The Municipal Court*, 387 U.S. 523 (1967). Because of this underlying purpose, this Court has previously held that Fourth Amendment protections do not apply solely to government agencies conducting searches with "law enforcement objectives in mind". *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Camara v. The Municipal Court, supra.*

Warrantless searches, regardless of the motives of the government agent conducting them, are presumptively unreasonable. *See, e.g., Chimel v. California*, 395 U.S. 752 (1969); *United States v. Place*, 462 U.S. 696 (1983). Personal motive—altruistic or egoistic—of the government employee has never been a basis to deny Fourth Amendment protections against an otherwise unreasonable search or seizure.

In reality, the holding by the Tenth Circuit in this case requires that one of the factors to be considered in

determining the applicability of the protections of the Fourth Amendment is the "job description" of a government agent at the time he commits an unlawful act. This test employed by the Tenth Circuit will serve to sanction the most unlawful and flagrant violations of the Fourth Amendment. Apparently, large portions of suppression hearings will now be devoted to a perusing of government employee manuals in conjunction with an explanation of the duties of a particular government agent so that the reviewing court may determine exactly what the objective of the agent's employment with the government entails. Concomitant with this test, the court will also have to determine what the personal motivation of the government agent was in conducting the illegal search. The utilization of this test will only serve to wither away the safeguards guaranteed to the people by the Fourth Amendment to the United States Constitution. That Amendment was always intended to serve as a safeguard against government intrusion, regardless of the motives or the particular "job description" of the intruder.

At the time he searched the package, it is uncontroverted that Van Dusen was a postal employee in the course of his employment and, therefore, a government agent. The Fourth Amendment protects individuals from unreasonable searches by agents of the sovereign. The protection afforded by the Fourth Amendment does not depend upon the intention of government agents to use evidence derived from a search in a later criminal prosecution. Inquiry into the intent motivating the illegal conduct of one who was admittedly a government agent is inappropriate and without legal foundation in Fourth Amendment princi-

ples. Simply put, the Fourth Amendment protects individuals from illegal searches and seizures by agents of the government, regardless of whether the government agent was acting within or without the "scope" of his employment. If allowed to stand, the Tenth Circuit's Opinion in this case will serve to sanction the most flagrant violations of the Fourth Amendment.

CONCLUSION

For the reasons set forth above, Geoffrey B. Smith, Jr. respectfully requests this Court grant his Petition for Certiorari.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX "A"

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	No. 86-1576
v.	)	
GEOFFREY B. SMITH, JR.,	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
for the District of Kansas

(D.C. No. 85-10012-01)

Jeffrey A. Springer (Thomas A. Ballantine III with him on the briefs), Denver, Colorado, for Defendant-Appellant. Robin D. Fowler, Assistant United States Attorney (Benjamin L. Burgess, Jr., United States Attorney and Jackie N. Williams, Assistant United States Attorney, on the brief), Wichita, Kansas, for Plaintiff-Appellee.

Before BARRETT, LOGAN, and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

Defendant, Geoffrey B. Smith, Jr., was indicted on charges of conspiracy to possess and distribute cocaine, possession with intent to distribute and distribution of cocaine, and the use of a communication facility to commit a felony. A motion to suppress evidence was denied, and defendant entered a conditional plea of guilty pursuant to Fed. R. Crim. P. 11(a)(2) to the conspiracy count (a vio-

lation of 21 U.S.C. §§ 841(a)(1) and 846) and the possession and distribution count (a violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. § 2). He appeals the district court's denial of the motion to suppress evidence. We affirm that decision for the reasons set forth below.

I.

In September 1983 defendant used the "express mail" service of the United States Postal Service to send a package from Fort Lauderdale, Florida, to Wichita Kansas. The package was addressed to Gerald Gibson (a co-defendant) and contained approximately two ounces of cocaine. A special delivery messenger for the Postal Service was given the package to deliver to Gibson. The messenger suspected that the package contained drugs, opened it, found the cocaine, used some of it, and took the package home. The messenger became worried that he would be discovered, contacted his attorney and, ultimately, met with agents of the Federal Bureau of Investigation (FBI). The FBI agents substituted imitation cocaine and placed it in the package in which the cocaine had been sent. The messenger then delivered the package to Gibson at the address indicated on the package. Agents executed a federal search warrant at Gibson's residence and seized the package with its contents. Thereafter, defendant was indicted.

II.

The issues present in this case may be summarized as follows:

A. Whether the warrantless search and seizure of a package containing contraband by a Postal Service em-

ployee falls within the protections of the fourth amendment.

B. Whether a subsequent examination of the package by the FBI violated defendant's fourth amendment rights.

III.

A. *Postal Employee's Search and Seizure*

The fourth amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." The Supreme Court has interpreted this clause to apply only to governmental action and not to private individuals who are not acting as agents of the government or with the participation and knowledge of a government official. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Thus, a search or seizure, even if unreasonable, is not proscribed by the fourth amendment if it is performed by a private person who is not acting as a government agent or in concert with an official of the government. *United States v. Walsh*, 791 F.2d 811, 814 (10th Cir. 1986).

In this case, a package in the United States mails was searched and seized by an employee of the federal government. First class mail "is free from inspection by postal authorities except in the manner provided by the fourth amendment." *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970). The question we must answer is whether the special delivery messenger was acting as a postal authority on behalf of the government when he searched and seized the package containing cocaine.

An employee is not acting as his employer's agent when he acts outside the scope of the employment. W.

Keeton, D. Dobbs, R. Keeton and D. Owen, Prosser and Keeton on Torts 503-05 (5th ed. 1984). "Scope of employment" has been defined as "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." *Id.* at 502; Restatement (Second) Agency §§ 228-29 (1958). In the torts context, the context of scope of liability is an important limitation on imputing the acts of an employee to an employer. 5 F. Harper, F. James, Jr., and O. Gray, the Law of Torts § 26.6 at 24 (2d ed. 1986). Unauthorized acts may come within the scope of the employment if they were intended to accomplish an objective of the employment. *Id.* at 502-03; Restatement (Second) Agency §§ 231, 235 (1958).

In this case, the messenger was not acting as a governmental employee when he seized and opened the package containing the cocaine. The record reflects that the duties of the special delivery messenger were to deliver "express" and "special delivery" mail. Record supp. vol. I at 12. He was given the package to deliver as express mail to a certain address. Rather than fulfill that duty, he took the package because he believed it might contain drugs due to the Florida return address. He was seeking drugs, not for some governmental purpose, but for his personal use. After he opened the package and found the cocaine, he used some of it and took it home for his personal use. This "search and seizure," therefore, was not part of the messenger's duties as a Postal employee, was not done to further any governmental objective, but was done solely

for the messenger's personal use. Because the messenger was not acting as a governmental agent or to further a governmental objective, but rather, as a private individual, there was no governmental search or seizure within the intendment of the fourth amendment. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

B. *FBI Examination*

Defendant challenges the FBI's examination of the package of cocaine. After the messenger took the package, he opened it and removed a "heat-sealed" package containing the cocaine. He completely opened the heat-sealed package and used some of the cocaine. Record supp. vol. I at 14. Aftr he took it home, he discarded the outer package and wrapped the cocaine in duct tape. Thereafter, he contacted his attorney, who, in turn, contacted a sheriff. The outer package was recovered, and the cocaine in the duct tape was delivered to an officer of the Sedgwick County Sheriff's Office. The sheriff then gave the package materials and the cocaine wrapped in duct tape to the FBI. The cocaine had not been reinserted into the package materials. *Id.* at 20. An agent of the FBI then opened the duct tape surrounding the cocaine.

In *United States v. Jacobsen*, 466 U.S. at 115, the Supreme Court instructed that when there has been a search by a private party, any additional invasion of privacy by the government "must be tested by the degree to which they exceeded the scope of the private search." In this case, the FBI agent did not exceed the scope of the private search. The defendant concedes as much. Appellant's Opening Brief at 10. Any privacy interest in the

contents of the package had been eliminated because the package had been completely opened by the messenger. *Id.* at 121-22; *United States v. Walsh*, 791 F.2d at 815-17. Because the messenger had voluntarily notified authorities and delivered the cocaine to them, the FBI's action in examining the cocaine did not constitute a separate search which would require a warrant.

AFFIRMED.

APPENDIX "B"

MARCH TERM—APRIL 15, 1988

Before the Honorable James E. Barrett, Honorable James K. Logan and Honorable Bobby R. Baldock, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 86-1576
vs.	)	
	)	
GEOFFREY B. SMITH, JR.,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of defendant-appellant's petition for rehearing filed March 25, 1987.

Upon consideration thereof, the petition is denied.

/s/ Robert L. Hoecker
Clerk

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

U.S.A.,

Plaintiff,

Case No. 85-10012-01

vs.

GEOFFREY B. SMITH, JR.,

Defendant.

TRANSCRIPT OF MOTIONS PROCEEDING

(Filed December 10, 1985)

On the 30th day of September, 1985, came on to be heard various motions in the above-entitled and numbered cause before the HONORABLE PATRICK F. KELLY, Judge of the United States District Court for the District of Kansas, Sitting in Wichita.

APPEARANCES:

The U.S.A. appeared by and through Jack Williams and Emily Metzger;

The Defendant appeared in person and by and through Raymond E. LaPorte and Steve Kackley.

* * *

(p. 28) THE COURT: All right. I don't think I need any argument from the government on this one. Frank to say to you Mr. Kackney, this is the one issue that I have expended the most time coming to grips with in

dealing with the motion. You say that *Jacobsen* isn't applicable. My guess is there just isn't any authority anywhere that addresses with such, if you will, unfortuitous circumstances that came upon your client if it is that the postman himself opened it. I can appreciate your concern by suggesting that this is a government agent as opposed to anybody else, and without any hesitation the United (p. 29) States through any of its agencies, particularly the post office, has no business opening private mail. But doesn't it have to be that the government's agent opening of the private mail for his own personal gain in what would have to be an unauthorized, unlicensed circumstance, take him outside of the scope of his conduct as a government agent. If we address the facts of the matter here, and now having heard this young man knowledge his conduct, his conduct could hardly be said to be that of a government agent. He tells us here that he has done this before, been involved in other thefts, here comes a special delivery which he senses to be contraband, he takes it home—takes it somewhere to some kind of a restroom and in surreptitious manner opens it, gets into the Sony box, ascertains it's cocaine, takes it home, even tries it. This is not conduct of a United States agent; this is the conduct of an unlawful, unauthorized act. I said unfortuitous as far as your client is concerned, but I wonder if it would be any different actually than if, perhaps, your client had mailed in the two ounces of cocaine and rather than have the postman open it, simply misdeliver it, send it next door, and some other unsuspecting person thinks it's his and opens it and comes upon cocaine, and as, Mr. Van Dusen elects to do, turns it over to his lawyer, who, in turn, turns it over to the F.B.I. and

says, "There's cocaine in here." What difference would it make?

(p. 30) MR. KACKLEY: I think it would make a big difference because you're talking about a private individual an opposed to a government agent. And in the Fourth Amendment it's designed for the protection of us, not designed for the protection of the government. We are the ones that are supposed to be protected, and I think it's a big difference when you have got to a private individual—and that what *Jacobsen* deals with, private citizens that do this, and turn it over to the law enforcement. That's one case. But when you have got a government agent—that is exactly what he was in September of 1983, a government agent—government benefiting from their own wrongdoing. They can't say, "He was part of us but he's not any more so let us benefit from what he did." Fourth Amendment, again, is for our protection, not the government's. If you have got a private citizen, which is what happened in *Jacobsen*, fine, that is a horse of a different color at all together, but where you have got a government agent and the only way he was able to do what he did was because he was a government agent, that intentionally, not accidentally even, but intentionally, clear-cut violation of the Fourth Amendment like that, I don't think that that is something the government ought to benefit from their own wrongdoing. It's a door that once opened is going to be hard to shut. No problem with accidents. No problem with private citizens, but when it gets to the point where the government (p. 31) agent—all he's got to do is get fired and then he's no more an agent, but a government agent can do these kind of things, government can benefit from the

windfall, I think we might as well throw the Fourth Amendment out the window.

THE COURT: I think it's like any other Fourth Amendment case: You have to look at each case on its own merit. I have done that. I'm convinced that this is not an event which the United States or any representative of the postal authorities remotely acquiesced in, just happened that they had as an employee a person who would engage in unlawful conduct but who did recognize the severity of what he had done and elected to report it. That's what I said in saying that it is an unfortuitous circumstance and an unprecedented circumstance, but the mere fact that he happened to be a postal employee under the circumstances seems to me is irrelevant. The fact that he is a government agent per se is irrelevant, once the circumstances are explained and understood, as I think I do, and as I have tried to analyze it. I'm going to overrule the motion to suppress the opening of the package by the postal member.

Second question then is to suggest that once it's been delivered, as I get it, through Mr. Miller and an attorney and maybe what I have heard someone say here perhaps to county attorney representative, then to the hands of the F.B.I., having had some awareness of what the circumstances (p. 32) were and what happened and that it does cocaine, I know of no reason why the F.B.I. is required to seek a warrant, and I think under those circumstances it's come to them fortutiously and good law enforcement officers had responsibility then to follow-up and open it and to confirm what is in it. That is their privilege. No privacy rights running to anyone at that point that

I know about, and I don't see a need for a warrant if that's the second part of your motion.

MR. KACKLEY: Yes, sir.

THE COURT: It's overruled as well. All right. Where are we?

(p. 33) C E R T I F I C A T E

I, Jim D. Harper, United States Court Reporter in and for the District of Kansas, do hereby certify:

That the above and foregoing proceedings were taken by me at said time and place in stenotype;

That thereafter said proceedings were transcribed under my direction and supervision by means of computer-aided transcription, and that the above and foregoing constitutes a full, true and correct transcript of said proceedings;

That I am a disinterested person to the said action.

IN WITNESS WHEREOF, I hereto set my hand on this the 9th day of December, 1985.

/s/ Jim D. Harper
United States Court Reporter

Supreme Court, U.S.
FILED
SEP 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-2057

In the Supreme Court of the United States

OCTOBER TERM, 1988

GEOFFREY B. SMITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

EDWARD S.G. DENNIS, JR.
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QUESTION PRESENTED

Whether a Postal Service messenger who opened an express mail package in the course of a theft for personal gain conducted a government search that should result in the exclusion of the evidence that was retained when the messenger confessed his theft and turned the evidence over to law enforcement officials.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2057

GEOFFREY B. SMITH, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 810 F.2d 996.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1988. A petition for rehearing was denied on April 15, 1988 (Pet. App. A7). The petition for a writ of certiorari was filed on June 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a conditional plea of guilty in the United States District Court for the District of Kansas to charges of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846, and possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). He

was sentenced to concurrent terms of five years' imprisonment and to a special parole term of six years. The court of appeals affirmed (Pet. App. A1-A6).

The evidence at the suppression hearing established that petitioner used the United States Postal Service's express mail service to send a package from Fort Lauderdale, Florida, to an individual in Wichita, Kansas. The Postal Service messenger in Wichita, who suspected that the package might contain drugs, failed to complete the delivery. Instead, he stole the parcel. Upon opening it, the messenger discovered that it contained approximately two ounces of cocaine. He used some of the drug but ultimately contacted an attorney and turned the package over to the Federal Bureau of Investigation (FBI). The FBI agents replaced the cocaine with imitation contraband and arranged for the Postal Service to complete the delivery. The agents subsequently arrested petitioner and the recipient, who were each indicted on various drug charges. Pet. App. 2a.

The district court denied petitioner's motion to suppress the cocaine, holding that the messenger's actions did not constitute a government search (Pet. App. A8-A12). The court found that the messenger had opened the package in the course of committing a theft for "his own personal gain" (*id.* at A9), that his action had been "unauthorized" and "unlicensed" (*ibid.*), and that he had acted "outside of the scope of his conduct as a government agent" (*ibid.*). The court of appeals affirmed (*id.* at A1-A6). Citing the familiar common law principle that an employee "is not acting as his employer's agent when he acts outside the scope of the employment" (*id.* at A3), the court observed that the messenger "was not acting as a governmental agent or to further a governmental objective, but rather, as a private individual" (*id.* at A5). Accordingly, the court

held, "there was no governmental search or seizure within the intendment of the fourth amendment" (*ibid.*).

ARGUMENT

Petitioner contends (Pet. 7-10) that the Postal Service messenger's opening of the package in the course of committing a theft for his own personal gain constituted a government search subject to the Fourth Amendment's limitations. The court of appeals properly rejected that contention. Even if the messenger's acts amounted to a government search, the exclusionary rule would not require a court to suppress the contents of the package at trial. The factual situation in this case, which the district court characterized as "unprecedented" (Pet. App. A11), is highly unusual and unlikely to recur. The court of appeals' decision does not conflict with any decision of this Court, another court of appeals or, to our knowledge, any other court. Further review accordingly is not warranted.

The Fourth Amendment's guarantee against "unreasonable searches and seizures" imposes restraints upon " 'governmental action'—that is, 'upon the activities of sovereign authority.' " *New Jersey* v. *T.L.O.*, 469 U.S. 325, 335 (1985) (quoting *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921)). The messenger's act of opening a parcel in the course of committing a theft was not governmental action. The Postal Service did not approve of, or even know of, the messenger's illicit activity. As the court of appeals explained, the messenger's action "was not part of the messenger's duties as a Postal employee, was not done to further any governmental objective, but was done solely for the messenger's personal use" (Pet. App. A4-A5). Indeed, the government's and the messenger's interests were diametrically at odds. The messenger's theft of the mail

prevented the accomplishment of the specific governmental function—postal delivery—that the messenger was hired to perform. The messenger not only acted strictly out of self-interest and contrary to the government's own interests, but he also opened the package without claim or color of sovereign authority. A Postal Service employee who clandestinely opens the mail without claim of right for the sole objective of converting contraband to his own use cannot be described in any meaningful sense as engaged in the "activities of sovereign authority" (*T.L.O.*, 469 U.S. at 335).

Even if the messenger's acts were treated as governmental action, the exclusionary rule would not require the courts to suppress the evidence obtained when the messenger turned himself in to law enforcement officials. The exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' " *United States* v. *Leon*, 468 U.S. 897, 906 (1984) (quoting *United States* v. *Calandra*, 414 U.S. 338, 348 (1974)). The rule's application has therefore been limited to those circumstances in which it "pay[s] its way" by deterring official misconduct (*Leon*, 468 U.S. at 908 n.6). Accordingly, if the exclusionary rule " 'does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted' " (*id.* at 909, quoting *United States* v. *Janis*, 428 U.S. 433, 454 (1976)). There is no reason to believe that suppression of the evidence in this case would deter in any way the type of misconduct that occurred here. Plainly, a Postal Service messenger who contemplates theft of a parcel for personal gain would not be deterred by the possibility that, if he steals the package, discovers that it contains contraband, and is apprehended or confesses his

crime, the contents of the parcel will be suppressed at the sender's or addressee's trial.

Petitioner's contention (Pet. 10) that the court of appeals' decision in this case will lead to "the most flagrant violations of the Fourth Amendment" is groundless. As we have noted, the factual pattern presented in this case is exceedingly unusual, and even if the same facts were to arise more commonly, it is highly unlikely that a ruling either to suppress evidence obtained in this manner or to admit it at trial would have any effect on the frequency of thefts by Postal Service employees. Accordingly, absent a conflict among the circuits and some basis for believing that the question here would present a matter of recurring importance, there is no occasion for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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